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Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES

March Term, 1999

No. 98-8770

JAMES MICHAEL FLIPPO,

Petitioner,

v.

STATE OF WEST VIRGINIA,

Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF WEST VIRGINIA

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TABLE OF CONTENTS

TABLE OF AUTHORITIES.....i

ARGUMENT.....1

POINT ONE: THE ARGUMENT RAISED IN RESPONDENT'S BRIEF HAS ALREADY BEEN EXPLICITLY REJECTED BY THIS COURT IN THOMPSON v. LOUISIANA. THE PETITION FOR CERTIORARI SHOULD THEREFORE BE GRANTED.....1

POINT TWO: THE ILLEGALLY SEIZED PHOTOGRAPHS WERE USED BY THE STATE TO MAKE REPEATED AND GROSSLY IMPROPER SUGGESTIONS TO THE JURY THAT PETITIONER IS HOMOSEXUAL. PETITIONER'S RESPONSE DOES NOT EVEN ADDRESS THIS PREJUDICE. THE TRIAL COURT'S ERROR WAS THEREFORE NOT HARMLESS.....6

CONCLUSION.....9

TABLE OF AUTHORITIES

Cases

Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed. 290 (1978).....passim

Thompson v. Louisiana, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984).....passim

ARGUMENT

POINT ONE: THE ARGUMENT RAISED IN RESPONDENT'S BRIEF HAS ALREADY BEEN EXPLICITLY REJECTED BY THIS COURT IN THOMPSON v. LOUISIANA. THE PETITION FOR CERTIORARI SHOULD THEREFORE BE GRANTED.

The entire focus of this case in state court was on whether the courts below would obey Mincey v. Arizona, 437 U.S. 385, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978), and suppress photographs seized without a warrant from a closed briefcase inside petitioner's cabin. The state court, after being made aware of Mincey by counsel for both sides, refused to follow United States Supreme Court precedent. Instead, it announced a rule that the police can search "anything and everything" at a crime scene without a warrant. This rule was explicitly deemed unconstitutional in Mincey.

Petitioner cited Mincey to the trial court as authority for suppression. Respondent cited Mincey in its argument against suppression. The sole ground stated by the court in its written order denying suppression was that "the investigating officers, having secured, for investigative purposes, the crime scene, were within the law to conduct a thorough investigation and examination of anything and everything found within the crime scene area." Order of May 28, 1997 at 3; Petitioner's Appendix at 3. It is difficult to imagine a more blatant announcement of a court's intention to flout the holding of Mincey.

Respondent's brief has virtually conceded the following essential points:

- The trial court's ruling, if taken at face value and given the plain meaning of its words, contradicts Mincey v. Arizona. Respondent's Brief at 13.[1]
- The exceptions to the warrant requirement for plain view, exigent circumstances and inventory searches do not apply to this case "in light of the testimony at the suppression hearing." Id at note 5.
- The police never asked petitioner for consent to search his cabin; petitioner never told the police they could make the search; the State never raised the issue of consent in the state courts; and the trial judge never mentioned consent in his order.

Nonetheless, the State argues that certiorari should be denied because a speculative theory of implied consent -- a theory that was not previously raised by either party, was not considered or mentioned by the court below, and has no foundation in either federal or West Virginia law -- might provide an alternative ground for the lower court's ruling.

This argument, which forms almost the entire basis for respondent's brief, has already been explicitly rejected by this Court -- both as a matter of law, and on facts virtually identical to those of the case at bar.

In Thompson v. Louisiana, 469 U.S. 17, 105 S.Ct. 409, 83 L.Ed.2d 246 (1984), the defendant shot her husband, took an overdose of pills, and then changed her mind about suicide and called her daughter for help. The daughter called the police, admitted them to the house, and

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[1]Respondent characterized the trial court's opinion as "either an unreasoned conclusory statement or an incomplete disclosure of the trial court's reasoning." Respondent's Brief at 13. There is however, nothing in the record to suggest that the trial court's reasoning was anything other than what it explicitly said.

took them to the room containing the defendant and the deceased. The officers secured the crime scene and took the defendant to the hospital. Thirty five minutes later, other officers arrived at the house. Without obtaining a warrant, these officers searched the entire house, finding evidence inside a chest of drawers, an envelope and a wastebasket. The officers admitted at the suppression hearing that no one had given consent to the search.

The Louisiana Supreme Court upheld the search. It ruled that because the defendant asked her daughter to bring the police , she had a diminished interest in the privacy of her home that took this crime scene search out of the purview of Mincey. The Louisiana court made no attempt to validate the search as consensual.

The prosecution in Thompson argued that the United States Supreme Court should deny certiorari and affirm the conviction for two reasons: that the Louisiana courts were correct in holding that the search did not violate Mincey; and that because the victim was the one who caused the crime to be reported and the police to come to her home, the search could be upheld on a theory of implied consent -- even though that theory played no role in the state court's decision..

This Court reversed, specifically rejecting both of the respondent's claims. This Court held that the search was a direct violation of Mincey, and that Louisiana's "diminished expectation of privacy" argument "closely resembles an argument we rejected in Mincey." 469 U.S. at 22, note 4; citing 437 U.S. at 391-392.

Respondent now claims that the result of Thompson was that this Court "remanded for *inter alia*, a consideration of consent." Respondent's Brief at 17. This is simply incorrect. The ruling in Thompson was that "the petition for a writ of certiorari is granted, the judgment of the

Louisiana Supreme Court is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion." 469 U.S. at 23. In short, this Court did exactly what it always does when overturning a state court denial of a motion to suppress -- it granted certiorari, reversed the conviction, remanded the case to the state courts, and directed the state courts to act in accordance with the opinion. The prosecution is certainly free, if it can do so under state rules of procedure, to ask the state courts on remand to belatedly consider consent. This Court, however, certainly did not order the state courts to do so.

Respondent now asserts that because this Court mentioned the State's last-minute claim of consent in Thompson, it somehow either implied approval of that theory, or directed that consent be reviewed by a state court. This too, is simply an incorrect reading of Thompson.

If anything, this Court strongly suggested that respondent's new claim was not a valid means of avoiding Mincey. Noting that "the issue of consent is ordinarily a factual issue unsuitable for our consideration in the first instance," the Court still stated that, "[p]etitioner's call for help can hardly be seen as an invitation to the general public that would have converted her home into the sort of public place for which no warrant to search would be necessary." 469 U.S. at 22, 23. If petitioner's call to the police for help did not diminish her expectation of privacy sufficiently to distinguish her case from Mincey, it is difficult to see how draping that call for help in the language of "implied consent" changes the Fourth Amendment analysis in any way.

Thompson is so similar to Mr. Flippo's case -- both factually and legally -- as to be indistinguishable.

In both cases, the petitioner either reported a crime to the police or asked someone to report it for them. In both cases, the petitioner caused the police to come to the crime scene. In

both cases, the police took the petitioner to the hospital, secured the crime scene, and some time later[2] -- without obtaining a warrant -- did a general search for evidence that included opening closed containers. In both cases, the issue of consent was neither raised by the prosecution nor addressed by the courts. In both cases, state courts upheld the search on grounds that had been explicitly rejected by the United States Supreme Court in Mincey.

The remarkable resemblance between Thompson and Flippo has continued at the United States Supreme Court level. In both cases, the State opposed certiorari and reversal, claiming that Mincey was not really violated, and that the belatedly conceived theory of implied consent was enough to avoid review.

In Thompson, this Court granted certiorari and reversed the conviction. The same result should be reached in Mr. Flippo's case.

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[2]Respondent correctly notes that the record does not state at exactly what time the police opened the briefcase. Respondent's Brief at 20, note 12. It is agreed, however, that about three hours after the officers arrived, and before they began the search, they took photographs of the inside of the cabin, including the briefcase, which was still closed. The search was therefore at least three hours after the police secured the crime scene, and may have been as much as fifteen hours later. In Thompson, the search began thirty five minutes after the scene was secured, so there can be no claim that insufficient time had passed in Mr. Flippo's case for Mincey to come into play.

POINT TWO: THE ILLEGALLY SEIZED PHOTOGRAPHS WERE USED BY THE STATE TO MAKE REPEATED AND GROSSLY IMPROPER SUGGESTIONS TO THE JURY THAT PETITIONER IS HOMOSEXUAL. PETITIONER'S RESPONSE DOES NOT EVEN ADDRESS THIS PREJUDICE. THE TRIAL COURT'S ERROR WAS THEREFORE NOT HARMLESS.

Respondent candidly admits that the prosecution case "was a circumstantial case built largely upon inconsistencies between Reverend Flippo's statements and the physical evidence." Respondent's Brief at 7. There were no eyewitnesses to the crime, no confession and no scientific evidence, such as DNA, tying Mr. Flippo to the homicide.

It was therefore horribly prejudicial when the State used the illegally seized photographs of a partially-nude man, Joel Boggess, to repeatedly suggest to the jury that Mr. Flippo is homosexual. The State coupled the introduction of the photos with equally prejudicial testimony that Mr. Flippo and Mr. Boggess had once gone on a ski trip, during which they shared a motel room that had only one bed. The relevance of this testimony has also never been established.

It is significant that the State never claimed that petitioner's alleged sexual orientation was a motive for the crime. Indeed the trial prosecutor, albeit disingenuously, even tried to claim that he was not suggesting anything about homosexuality at all -- he was merely letting the jury know "that the relationship of these two men was more than just good friends." T. 1581.[3]

A brief review of the State's closing argument reveals just how damaging the innuendo about homosexuality was:

> I didn't accuse Joel Boggess of being a homosexual. I didn't accuse him of being gay. I didn't accuse Mr. Flippo of being gay or homosexual. I never

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[3]Pages in the trial transcript will be noted as T.#.

did that. . . .

But I submit to you that most people in our society would think it's unusual . . . for a minister or pastor of a church to sleep with people in his church that he's not married to. . . .

Pastor Flippo is spending nights sleeping with Joel Boggess, am I wrong to think that's improper? . . .

I don't know what happened in that bed. . . .

And I don't know exactly what the extent of the relationship was between Mr. Flippo and Mr. Boggess, but it appeared to be very close, very intimate.

T. 1880-1882.

The illegally seized photos provided a graphic visual representation of the State's extraordinarily improper closing argument. Respondent's brief does not even address the prejudice caused by this sexual innuendo. Given the number and seriousness of these suggestions, the error cannot be deemed harmless.

Finally, respondent suggests that certiorari be denied because there is a theoretical possibility that petitioner might be permitted to re-raise the exact same issue in a state habeas corpus petition. However, as respondent acknowledges, West Virginia Code §53-A-1(b) precludes the relitigation of claims which "have been previously and finally adjudicated." Mr. Flippo's case falls squarely within this prohibition. Moreover, the chance is virtually nil that the same trial court that already heard the case and ruled on the issue would now decide that it was "clearly wrong," and invite state habeas review.

Although respondent has repeatedly asserted that "West Virginia is not a renegade State that chooses to ignore Mincey," Respondent's Brief at 11, the fact of the matter is that the trial

court announced a rule which does exactly that. Mr. Flippo, who is serving a sentence of life without possibility of parole, has been afforded no meaningful review of that decision, because the West Virginia Supreme Court of Appeals refused to permit any appeal of the trial court's ruling. Certiorari should therefore be granted, and the conviction reversed.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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